

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 177

J. S. KOHN, M. S. KOHN AND J. W. KOHN, ADMINISTRATORS OF THE ESTATE OF CARRIE KOHN, DECEASED, APPELLANTS,

vs.

CENTRAL DISTRIBUTING CO., INC., AND THE COMMONWEALTH OF KENTUCKY, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY

FILED JULY 5, 1938.



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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

EXHIBIT "A"

CARROLL'S KENTUCKY CODES

Sec. 63. Fine or forfeiture to recover; officer against.—Actions must be brought in the county where the cause of action, or some part thereof, arose—

1. Fine, penalty, or forfeiture to recover.—For the recovery of a fine, penalty, or forfeiture, imposed by a statute; but if the offense for which the claim is made be committed on a water-course or road which is the boundary of two counties, the action may be brought in either of them.
2. Public officer; against.—Against a public officer for an act done by him in virtue or under color of his office, or for a neglect of duty.
3. Action on official bond.—Upon the official bond of a public officer.

[fol. 2]

EXHIBIT "B"

CARROLL'S KENTUCKY STATUTES

Sec. 976. Franklin Circuit Court; jurisdiction in Commonwealth cases.—The Franklin circuit shall have jurisdiction, in behalf of the Commonwealth, of all causes, suits and motions against clerks of courts, collectors of public money, and all public debtors or defaulters, and others claiming under them; and for this purpose its jurisdiction shall be co-extensive with the state.

[fol. 3]

EXHIBIT "C"

CONSTITUTION OF KENTUCKY

Sec. 172. Assessment; how value fixed; penalty.—All property, not exempted from taxation by this Constitution,

shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

[fols. 4-5]

EXHIBIT "D"

CONSTITUTION OF KENTUCKY

Sec. 171. Levy and collection of taxes by general laws; public purposes only; uniform within the class and territory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for.—The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

[fols. 6-10]

EXHIBIT "E"

CONSTITUTION OF KENTUCKY

Sec. 174. Corporate, to be taxed like individual property; incomes; licenses; franchises.—All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises.

[fol. 11]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF KENTUCKY

Equite No. —

J. W. KOHN, M. S. KOHN, and J. W. KOHN, Administrator
of the Estate of Carrie Kohn, Deceased, Petitioners,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., 45 E. 11th Street,
Newport, Kentucky, and the Commonwealth of Kentucky,
by and on Relation of James W. Martin, Commissioner of
Revenue, and Louis C. Sickmeier, Sheriff, Campbell
County, Ky., Respondents

AMENDED PETITION FOR INJUNCTION—Filed April 11, 1938

Now comes the petitioners above named, and for a cause
of action against the respondents, allege and complain:

1. The petitioners above named state that they are citizens and residents of the State of Ohio, residing in the City of Cleveland; that since the execution of the mortgage hereinafter referred to, Carrie Kohn, one of the petitioners, has deceased, and J. W. Kohn is the duly qualified and acting administrator of her estate.

2. That the respondent, the Central Distributing Company, Incorporated, licensee, is a corporation organized under the laws of the State of Kentucky, and the said James W. Martin, Revenue Commissioner of the said state, is a citizen and resident of the State of Kentucky, and resides in the City of Frankfort; that said respondents are non-residents and non-citizens of the State of Ohio, and your petitioners are non-residents and non-citizens of the State of Kentucky.

3. That on or about the 9th day of February, 1937, the respondent corporation, the Central Distributing Company, Incorporated, by its president, William Ploss, and R. Webster, Secretary, did execute its note to the petitioners above named, in the sum of Three Thousand (\$3000.00) Dollars, payable on demand and from and after date, with interest

at the rate of 6% per annum, which said note was payable at 45 E. 11th Street, Newport, Kentucky. That said note was secured by a chattel mortgage executed on the 9th day of February, 1937, which said mortgage was filed of record in the County of Campbell, State of Kentucky, on the 27th day of March, 1937, at three o'clock and three minutes P. M., on that date; that said mortgage is duly recorded in the Clerk's office of said County of Campbell, in Book No. 18, Page 491, file No. 977, and that at all times hereinafter alleged was an existing and valid lien against the property specified in said mortgage owned by the Central Distributing Company, Inc., one of the respondents herein. That no part of said sum has been paid and that the same is now due and the said respondent is in default of the payment thereof and due demand was made for the payment of said on or about the — day of May, 1937. That the petitioners took possession of said property on or about said date and have carried on said business under the authority of the Central Distributing Company, Inc., since said time. A copy of said note and mortgage is attached hereto and made a part hereof, of this, the petitioners' said complaint. The amount in controversy in this action is the sum of Four Thousand, Four Hundred and Sixty-eight and 65/100 (\$4,468.65) Dollars, claimed by the said James W. Martin, and the amount due petitioners is more than the sum of Three Thousand, One Hundred (\$3,100.00) Dollars,

4. That on or about the 16th day of February, 1938, the respondent, James W. Martin, as Commissioner of Revenue for the Commonwealth of Kentucky, attached all of the property covered by the said chattel mortgage of your petitioners, and now, by the Sheriff of Campbell County, Kentucky, L. C. Sickmeier, holds possession of all the said personal property, and has ousted your petitioners of the control of said property, and has taken possession of the business of the said Central Distributing Company, Inc., licensee, which act of the said respondents, James W. Martin, [fol. 13] Revenue Commissioner, and the said Sheriff, renders the security of your petitioners' impossibility of conversion into cash to satisfy the said note hereinbefore referred to; that at the time your petitioners took possession of said property, they appointed Harry Bayer as their agent, to carry out the terms of the agreement made between your petitioners and the Central Distributing Company, Inc.

corporated, licensee; that your petitioners would dispose of all of said assets covered by said mortgage, and continue the operation of said business until the said note was fully satisfied and paid; that the said Harry Bayer was in possession, as the agent of your petitioners, at the time of the service of the attachment above complained of and seizure of the property.

5. That your petitioners are informed and fully believe that the Central Distributing Company, Inc., licensee, is not indebted to the State of Kentucky in the sum complained of in the Petition of the Commonwealth of Kentucky, and James W. Martin, Revenue Commissioner, or the Commonwealth of Kentucky in any sum whatsoever.

6. That said property seized by the said James W. Martin, Revenue Commissioner, for the Commonwealth of Kentucky, is a part of the assets covered by the mortgage of your petitioners.

7. That all of said property, except the equipment in the office of the said Central Distributing Company, Incorporated, is whiskey in transit, imported from the State of Ohio, and on its way to the State of Florida; that at the time of the levy of the attachment complained of, the whiskey attached was in interstate commerce and in the original package, and was not located in the City of Newport, County of Campbell, State of Kentucky, for the purpose of local sale, but *the* the purpose of transporting the same to its final destination in the State of Florida. That at the said time and place, when said attachment order was served on the Central Distributing Company, Incorporated, licensee, the sum of Fifty-five (\$55.00) Dollars in cash, the property of your petitioners, was seized by the Commonwealth of Kentucky and James W. Martin, Revenue Commissioner, through the Sheriff of the County of Campbell, State of Kentucky, Louis C. Sickmeier.

8. That said property, at said time, was not subject to [fol. 14] garnishment or attachment by the said James W. Martin, Revenue Commissioner, and was not the property of the Central Distributing Company, Incorporated, licensee, except in the respects hereinbefore alleged; that the said Central Distributing Company, Incorporated, licensee, had no title or interest in said property except subject to

the lien provided by law and set out in the chattel mortgage of your petitioners.

9. That the taxes claimed as in default and due the Commonwealth of Kentucky are not a just claim against the Central Distributing Company, Inc., licensee. That the said statute under which the said taxes are claimed to be due is a void statute under the laws of the State of Kentucky, and were assessed against the Central Distributing Company, Incorporated, licensee, in violation of the Constitution of the State of Kentucky, Article on Revenue and Taxation, Sections 171, 172, 174 and 181. That said act under which taxes are attempted to be collected is referred to as "An Act relating to revenue and taxation on the sale and disposition of alcoholic beverages, etc.", approved by the Governor of the State of Kentucky, April 9, 1936. That said act lacks uniformity in its operation, and is an arbitrary classification of alcoholic liquors for taxation in violation of the Constitution of the State of Kentucky, Sections 171, 172, 174 and 181, as alleged, discriminatory and confiscatory. And in its operation is in violation of the Constitutional prohibition against local legislation, Section 59 of the Constitution. That the said tax attempted to be collected by the Commonwealth of Kentucky and James W. Martin, Revenue Commissioner, against the said Central Distributing Company, Inc., licensee, is not a valid license tax or a valid sales tax, or a valid franchise tax, or a valid ad valorem tax or a privilege tax, or a special tax, or excise tax, as provided by the Constitution of the State of Kentucky; that said tax is discriminatory against the respondent, Central Distributing Company, Incorporated, licensee, in that it provides for the levy of a tax not bases on the value of the whiskey sold, and the property sought to be taxed by the respondents, Commonwealth of Kentucky and J. W. Martin, Revenue Commissioner, and is not proportioned on the value of the whiskey sold, and is in derogation of the Constitution of the State of Kentucky, and of the rights of said Central Distributing Company, Inc., licensee, as provided in the Constitution as afore-alleged. That said act violates Article I, [fol. 15] Sec. 8 of the Constitution of the United States, and said act violates Section 9 of Article I of the Constitution of the United States, and said act violates Article I, Sec. 10 of the Constitution of the United States, and the Interstate Commerce Laws, enacted by the Congress of the

United States, and the 14th Amendment to the Constitution of the United States.

That said revenue act of the State of Kentucky, hereinbefore referred to is a burden on the commerce between states—Article I, Sec. 8 of the Constitution of the United States—and is in violation of the Constitution of the United States, controlling the import and export of commerce, and is in violation of the uniformity clause of the Constitution of the United States, and of the State of Kentucky relating to taxes.

10. (a) That in the attempt of the State of Kentucky and the respondents to enforce the present liquor control act, enacted March 3, 1938, is an ex post facto act as to the administration of the act of 1934, and in respect to Sec. 4 of the 1936 Act, the said action violates the 8th section of Article I of the Constitution of the United States, in that it is not uniform, because it taxes whiskey of the value of forty-five cents per gallon, and whiskey of the value of eighteen dollars per gallon, at the rate of \$1.04 per gallon, and other whiskies of different values at the same amount of tax.

(b) That Sec. 4 of said Act of 1936 violates Sections 171, 172, 174 and 181 of the Constitution of Kentucky, because it is repugnant to the — confiscatory, because the tax is greater than the value of the new whiskey and the one-year old whiskey and the two-year old whiskey; that the Act of 1938, March 3, as administered by respondents, is a violation of Sec. 10, Article I, of the Constitution of the State of Kentucky, Sec. 19 prohibiting ex post facto legislative acts, and the administration thereof; and that the respondents are now attempting to, and have ordered a hearing for the purpose of revoking the license of the Central Distributing Company, Incorporated, licensee herein, without adjudication by a judicially constituted court of the State of Kentucky, when the said respondents have no legislative authority to hold said hearing, based on the failure of said licensee to pay taxes under the act of 1936 as aforesaid; except under the act of March 3, 1938, which was enacted subsequent to the alleged due tax, under the Act of 1936, and against the licensee, a legal entity licensed under the [fol. 16] 1934 act now repealed, and which was, at all times hereinbefore alleged, violative of Amendment 7 to the Con-

stitution of the State of Kentucky, prohibiting the sale of whiskey in Kentucky as a beverage.

(c) That all of the acts of the respondents in the enforcement of said Act of 1936 (Sec. 4), and the enforcement of the Act of March 3, 1938, deny to the licensee due process of the laws of the State of Kentucky, Article 5 of the Constitution of the United States, and Amendment 14 to the Constitution of the United States, by denying the equal protection of the laws of the State of Kentucky, and the due process of the laws of the State of Kentucky, *and the due process of the laws of the State of Kentucky*, which, petitioners allege, are federal, constitutional guarantees to said licensee, that taxes shall be enforced according to the Constitution of Kentucky, and that no ex post facto legislation shall be imposed on said licensee, in respect of hearings or in respect of the enforcement of the laws that have been repealed, or in respect to the administration of the laws of the State of Kentucky, according to the said Constitution, in that its rights shall be determined at a hearing before a court of justice with jurisdictional and judicial powers; and that the Franklin Circuit Court of the State of Kentucky is without judicial grant of power to hold a hearing, or issue processes for the enforcement of said alleged taxes, or attach petitioners' merchandise, which it is attempting to do by an action now pending, brought by the respondents in the Franklin Circuit Court, and wherein it would attach licensee's property, and close its said business, in violation of Federal and State laws, and against the vested interests of the petitioners under their said mortgage.

That said proceeding denies the licensee of adjudicating its rights in a court with constitutional powers; and denies to it the due process and the equal protection of the laws of the United States; and said acts violate Section 8, Article I, of the Constitution of the United States, as guaranteed under Amendment 14 of the Constitution of the United States in the regulation of commerce between states, and is a direct burden on interstate commerce, in that the whiskey seized by the respondents was whiskey in transit from the State of Kentucky to another state, and violates the federal permit and license granted licensee by the United States, to engage in interstate commerce in liquor, [fol. 17] as provided by the revenue laws of the United

States. All of which destroys petitioners' security for its said debt due to them.

(d) That the construction of these laws is necessary for the determination of licensee's rights to do business and carry on its said business, and for the protection of the mortgage rights of these mortgagees. That the respondents are attempting to enforce the repeal laws of the Act of 1934, and said Section 4 and Section 22, which provide a fine and imprisonment of officers of licensee in a court, the Franklin Circuit Court, without jurisdiction to act in the respects herein alleged. That respondents are attempting, to collect an invalid tax in the sum of Forty-four Hundred (\$4400.00) Dollars from petitioners. That respondents are attempting, by an *ex post facto* law to enforce the collection of taxes that are invalid; that they are burdening interstate commerce as aforesaid. That by their said acts of attempted enforcement of this tax, which is void and invalid, they are aided by the agents of the United States Government, which agents are prohibited by the 5th Article of the Constitution of the United States, in that said agents of the United States Government have and are visiting the place of business of said licensee, and demanding the examination of its books, pending a proceeding in the City of Washington, D. C., on a hearing for the suspension of licensee's right to carry on business as aforesaid under its said permit, without an order from the court holding said hearing, and without the authority of any valid law or regulation of the United States Government, or of any court with jurisdiction of licensee's business.

(e) That licensee has not been adjudicated in any court to have been engaged in, or of unlawfully operating its said business or of having refused to obey any valid law of the State of Kentucky, or of the United States, under its said permit, and has sold largely all liquors in interstate commerce without any tax due, or to be lawfully exacted of it by the said respondents; all of which acts of respondents deny the due process of the laws of the State of Kentucky, as guaranteed by the 14th Amendment to the Constitution of the United States, to licensee, and the equal protection of the laws thereof, which unlawful acts of respondents affect and destroy the security of these petitioners.

[fol. 18] (f) That the Act of March 3, 1938, of the Legislature of Kentucky, violates the Constitution of the State of Kentucky, in that it invades, by its terms, the laws controlling the commerce between the states, provides for no constitutional machinery of enforcement, and taken as a whole, it is repugnant to the constitutional provisions thereof Sections 3 and 19; it is unenforceable, unintelligible and incapable of legal enforcement, and creates and establishes a monopoly under the control of respondents, in transportation, in selling intrastate and interstate liquors, and confers and delegates legislative power to respondents and judicial power to respondents, in violation of the Bill of Rights of the Constitution of the State of Kentucky and the provisions thereof, relating to legislative, judicial and executive departments of government.—Sections 26, 27, 28 and 109.

(g) That is, under the terms of this Act, enforcement of which is now sought by respondents against the said licensee, constitutes oppression of said licensee and its rights, under its State and Federal permits; that the said acts of respondents as aforesaid, deny to these petitioners and to their said licensee, an adequate or a speedy remedy at law by appeal; that the damage inflicted by respondents in seizing licensee's business, and the procedure to revoke its permit, and impair its contracts for future delivery of whiskey, constitute irreparable damage and wrong and injury to its said business; that by reason thereof, these petitioners will lose their money, their mortgage contract will be impaired, and their security dissipated and lost by the payment of attorneys' fees, court costs and damage suits for breach of contracts; that petitioners or their licensee will be unable to perform, by reason of the unlawful acts of respondents, and which contracts are incurred in interstate commerce.

(h) That respondents have already seized merchandise in the sum of approximately Four Thousand (\$4,000.00) Dollars, which was moving in interstate commerce, and though respondents collected at different times from licensee large sums of money on imported whiskey brought into Kentucky from other states, and imported in interstate commerce, nevertheless petitioners' licensee would not resist said respondents because of the fact that they would

revoke and cancel licensee's permit to do business in the State of Kentucky, if it objected to the payment of said [fol. 19] taxes; that said tax was not levied for the purpose of inspecting the importation of said merchandise, and no part of the same was paid into the Treasury of the United States.

11. That Louis C. Sickmeier is Sheriff of Campbell County, Kentucky, and as such officer, seized said property and is in possession thereof.

12. That your petitioners will suffer irreparable injury and damage and they have no adequate remedy at law to protect their property and their rights to and in said property, and unless an injunction is issued by this court, will continue to suffer irreparable injury and damage to the property and the said business, and leave no security for their debt.

13. That Chapter 16, Carroll's Code of Kentucky, exempts any officer levying process on any property of an individual or corporation from damages for wrongful act, and the said act and the statutes exempt the State of Kentucky for similar offense, and further provides that the Commonwealth of Kentucky may not be sued in damages. The petitioners, therefore, have no adequate remedy for wrongful act of the respondents. That by reason of said statutes and exemption of liability of the respondents, the petitioners are denied due process of the laws of the State of Kentucky, in violation of Amendment 14 of the Constitution of the United States, and the equal protection of said laws.

14. That in all cases where attachment suits are brought and levies made, the Statutes require that individuals or corporations give a bond to secure the wrongful acts of the said petitioners, and the petitioners allege that they are in this case denied the equal protection of the laws of the State of Kentucky, by reason of said discriminations and the equal protection of the laws as prohibited to the Legislature of Kentucky by the 14th Amendment to the Constitution of the United States.

15. That all or nearly all of commerce in which these petitioners are engaged is in interstate commerce, and that all of the transactions in which petitioners are engaged

are controlled by the Twenty-first Amendment to the Constitution and the Act of Commerce which is a law of the Congress controlling the business of these petitioners, and the Central Distributing Company, Incorporated's licensee.

[fol. 20] 16. That at the time of the levy complained of, the respondents, the said Sheriff of Campbell County, Kentucky, and the said James W. Martin, Revenue, Commissioner, under attachment process, closed the place of business of the petitioners without legal or statutory authority of the State of Kentucky in this proceeding. That said business could not be seized and closed except by a revocation of the license of the Central Distributing Company, Incorporated, under and by authority of an entirely different procedure and statute, and such action has not been taken by the State of Kentucky.

17. That the Act of the Legislature of Kentucky, of 1934, prohibits the sale of or manufacture of or transportation of spirituous, vinous or intoxicating malt liquors, except for medicinal purposes, and that the tax herein sought to be collected is a tax levied under a subsequent act of the Legislature of Kentucky in 1936, which tax was levied against wholesalers and retailers licensed to sell medicinal liquor under the act of 1934.

18. That said act of 1934 was, in truth and in fact, a law enacted, licensing wholesalers to sell, transport and deliver alcoholic liquors and intoxicating liquors as a beverage, and was so treated at all times hereinbefore alleged, and is now recognized by the respondent commissioner and the State of Kentucky as a licensing act and a tax act for the sale of alcoholic liquors purely as a beverage.

19. That at the time of its enactment in 1934, there was no grant of authority to the legislature of Kentucky to enact any valid law for the sale of intoxicating liquors in the State of Kentucky, or to license wholesalers for the said purpose. This because the Constitution of Kentucky prohibited the sale of whiskey and the licensing of wholesalers for the sale of whiskey as a beverage, which said provision of the Constitution is Section 226a, as follows:

“Manufacture, sale or transportation of intoxicating liquors prohibited: Exception: Legislature to enforce.—After June 30, 1920, the manufacture, sale or transportation

of spirituous, vinous, malt or other intoxicating liquors, except for sacramental, medicinal, scientific or mechanical purposes, in the Commonwealth of Kentucky, is hereby prohibited. All sections or parts thereof of the constitution, [fol. 21] insofar as they may be inconsistent with this section, are hereby repealed and nullified. The general assembly shall enforce this section by appropriate legislation."

20. That said act was and is in violation of the provision hereinbefore alleged; that said act of 1936 can only be regarded and is an act amendatory and supplemental to the act of 1934; that the act of 1936 contains no authorized provision for the licensing of wholesalers or retailers or the sale and transportation of intoxicating liquors; that the act of 1936 standing alone, exclusive of the act of 1934, does not create a licensee for the wholesale of intoxicating liquors, and, therefore, the act of 1936 was invalid and ineffectual as a taxing act, because there was, at the time of its enactment, no valid power of the State of Kentucky that could be exercised for the license of wholesalers dealing in intoxicating liquors as a beverage.

21. That it is alleged by the petitioners that at said time the attachment and levy was made upon the property of the respondent, Central Distributing Company, Incorporated, licensee, there was no legal authority in the State of Kentucky to collect said tax, and that the petitioners or the respondent, Central Distributing Company, Incorporated, were not liable for the payment of the tax attempted to be collected herein.

22. That Section 2 of Article 4 of the Act of 1934 provides no spirituous, vinous or intoxicating malt liquors shall be manufactured in this state for storage or sale at retail within this state after this act becomes effective, without a permit therefore, issued by State Tax Commission as herein provided. No person shall sell vinous, spirituous or intoxicating malt liquors in this state, except as provided in this act.

Section 5 of Article 4 provides no wholesaler shall sell or contract to sell any spirituous, vinous or intoxicating malt liquors, who is not duly authorized under this act to receive, possess, transport, distribute or sell the same.

23. That under the above provisions of this act, no person could engage in the sale at retail or wholesale of intox-

eating liquors as a beverage, that the act of 1936 does not completely provide for the sale or license of intoxicating liquors in itself.

24. That at the time of the levy for the payment of the taxes by the Central Distributing Company, Incorporated, [fol. 22] licensee, there was no existing law in the State of Kentucky, authorizing the collection of said tax, and that the levying and collection of said tax denied to the petitioners, due process of the law as hereinbefore alleged.

25. That the said Franklin Circuit Court is without jurisdiction to issue processes out of Franklin County, Kentucky, except in civil actions, under Sec. 976 of the Kentucky Statutes, and limited in its jurisdiction to enforce imprisonment penalties outside of Franklin County, Kentucky, against persons or corporations located in other counties who commit breaches of penal statutes in other jurisdictions.

26. That as to the import tax levied under the Act of 1934, and not attempted to be levied under the Act of 1938, respondents are taking from licensee daily, and impairing the security of these petitioners, an unlawful tax unauthorized by the Constitution of the State of Kentucky, and violative of Section 8 of Article I of the Constitution of the United States; and that said licensee has paid approximately the sum of Eight Thousand (\$8000.00) Dollars in the last twenty (20) months to the said respondents. That said taxes are a burden on interstate commerce between states, and takes the property of petitioners' licensee without due process of law.

And that all of the proceedings and acts of respondents have been arbitrarily exercised to the great damage and injury of licensee's business, and attempted to and did confiscate licensee's profits, which were ample before the imposition of said tax of Section 4 of the Act of 1936, and which, since the imposition of said tax, have confiscated all the profits on the cheaper grades or younger grades of whiskey.

27. That at the time of the filing of this action for injunctive relief, there was no pending action in any court by the parties to this action.

28. That the Act of the Legislature of Kentucky of 1934, and the act of 1936 as enforced, complained of, denies your

petitioners due process of the laws of the United States, 14th Amendment and Section 10, Article I.

29. The petitioners respectfully suggest that the constitutional questions raised herein do involve the construction of the Constitution and the laws of the United States, and, [fol. 23] therefore, a hearing on the temporary and permanent injunction be had by three (3) judges of the Federal Court, as provided by the rules.

Wherefore, your petitioners pray that a restraining order be issued to show cause, and a temporary injunction be issued within the discretion of the court, and, finally, at a hearing, that respondents be enjoined from carrying out their intention of selling — disposing of said property, and that this court exercise its equity powers in aid of your petitioners in foreclosing its mortgage on said property, and in furtherance of the business of the Central Distributing Company, Incorporated, licensee, until and when the note referred to herein shall have been fully paid; and that the court make such orders in the premises as it shall deem just and equitable, and that the statute authorizing said taxes claimed be held invalid, and respondents be enjoined from holding a hearing to revoke licensee's permit until the final hearing of this court. Further, your petitioners saith not.

Smith & Schuberth, Henry J. Cook, Attorneys for Petitioners.

Duly sworn to by Harry Bayer. Jurat omitted in printing.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

[Title omitted]

ORDER FILING PETITION, ETC.— Filed February 26, 1938

This cause coming on for hearing on the motion of the plaintiffs to permit their filing of petition for injunctive relief, it is ordered that petition be filed for the purpose of determining the jurisdiction of the Court.

Plaintiffs are directed to deliver to the Attorney General of the Commonwealth of Kentucky copies of their petition and brief or briefs herein, and the Attorney General is allowed ten days after the receipt of such copies within which to file brief on the matters presented to the Court herein.

MacSwinsford, Judge.

Feb. 26, 1938.

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

RECEIPT—Filed March 9, 1938

Received brief in the above styled case this the 8th day of March, 1938.

William Hayes.

[fol. 26] IN UNITED STATES DISTRICT COURT

CHATTEL MORTGAGE

Know All Men by These Presents:

That, Central Distributing Company, Inc., incorporated under the laws of the State of Kentucky, the Grantor, for the consideration of Three thousand Dollars (\$3000.00) received to its full satisfaction of Carrie Kohn, J. W. Kohn and M. S. Kohn the Grantees, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, unto the said Grantees, their heirs and assigns forever, the following described goods, chattels and property, now remaining and being in our possession, to-wit:

- 1—66" Walnut "Finish" Office Desk.
- 1—60" Walnut "Finish" Office Desk.
- 1—54" Walnut "Finish" Typewriter Desk.
- 1—42" Walnut "Finish" Typewriter Desk.
- 1—32" Walnut "Finish" Office Table.

- 1—6-cornered Golden Oak Office Table.
- 1—Walnut "Finish" Humidor with Glass Top.
- 1—3' x 6 $\frac{1}{2}$ "Lyon" Metal Cabinet with Shelves.
- 1—3' x 6' Metal Cabinet with Shelves.
- 1—Mosler Iron Safe.
- 2—Four-Drawer "Ahrora" Metal Filing Cabinets.
- 1—Four-Drawer "Armor" Metal Filing Cabinet.
- 1—Section, Four Drawers, Metal Filing Cabinet.
- 1—#2000 National Cash Register and Stand.
- 1—#131108, "Paymaster" Check Writer.
- 1—9' x 12' Seamless Rug.
- 1—Royal Typewriter #X-939663.
- 1—Remington Typewriter #RP-62181.
- 2—Walnut "Finish" Swivel Office Chairs.
- 3—Walnut "Finish" Swivel Typewriter Chairs.
- 5—Office Chairs.

Including Entire Stock of Goods and Merchandise and All Other Fixtures of Whatever Kind or Nature That is Located and Situated in the Store and Basement at #45 E. Eleventh Street, Newport, Kentucky.

To Have and to Hold all and singular the goods, chattels and property above granted, bargained and sold, or intended to be granted, bargained and sold unto the said grantees, their heirs and assigns.

The condition of this mortgage is such, that whereas the said grantor has executed and delivered to the said Carrie Kohn, J. W. Kohn and M. S. Kohn a certain promissory note, of even date herewith, for the sum of \$3,000.00, payable on demand from and after date hereof with interest thereon at the rate of six per centum per annum payable at #45 E. Eleventh Street, Newport, Kentucky. On failure to pay said note or interest thereon when, due, or upon demand, thereupon said note shall immediately become due and payable without further notice or demand, such further notice and demand being hereby expressly waived.

[fol. 27] It is Expressly Agreed, by and between said grantor and grantees, that if said note or the interest accrued thereon, shall not be paid within three days after falling due, then said note shall at once become due and payable, at the election of said grantees

Now if the said Central Distributing Company, Inc., its successors or assigns shall well and truly pay the aforesaid

sum of money, ~~and~~ interest, at the time and in the manner and form as above set forth, and shall keep and perform the covenants and agreements above contained, on its part to be kept and performed, according to the true intent and meaning thereof then this mortgage shall be void; otherwise the same shall be and remain in full force and virtue at law.

And the said grantor does hereby covenant and agree to and with the said grantees, their heirs and assigns, that in case default shall be made in the payment of the sum of money above mentioned, or in the performance of any of the above mentioned covenants at the time limited for such payment or performance; or in case grantor shall commit any waste or nuisance, or attempt to secrete or remove the above described goods or chattels, or any part thereof; or if the said grantees, their heirs or assigns, shall at any time before said sum of money becomes due, deem it necessary for their more complete and perfect security, the said grantees, their heirs and assigns, are hereby authorized and empowered, with or without the aid of assistance of any person or persons, to enter the dwelling house, store or other premises of said grantee, or such other place or places as the said goods or chattels are or may be placed, and take and carry away said mortgaged property, and sell and dispose of the same at public auction or private sale, at once, without notice, and out of the money arising therefrom to retain and pay the said indebtedness above mentioned, and all charges touching the same, or to retain a sufficient amount of money arising from such sale, necessary to indemnify the said grantees for any damages by them sustained by reason of the violation of any of the aforesaid covenants on the part of the grantor; shall also pay out of the proceeds of said sale all proper and reasonable costs, attorney's fees and expenses incurred in the premises, including all costs and expenses incurred in pursuing, searching for, taking, removing, keeping, storing and selling said property, and may pay all liens thereon having precedence over this mortgage, rendering the overplus (if any) to the said grantor, its successors or assigns; and until default shall be made in the payment of said indebtedness or breach shall have been made in the performance of any of said covenants on the part of said grantor, the said grantor to remain and continue [fol. 28] in the quiet and peaceable possession of the said goods or chattels, and in the full and free enjoyment of the same.

In Witness Whereof, we hereunto set our hand, this 9th day of February A. D. 1937.

Central Distributing Company, by William Ploss,
Pres., by R. Webster, Secy. (Seal.)

Signed and acknowledged in presence of Elsie M. Dewald.

STATE OF KENTUCKY,

County of Campbell, set:

I, Elsie M. Dewald, a Notary Public, in and for said county and state, do certify that the within and foregoing instrument of writing from Central Distr. Co., Inc., to Carrie Kohn, J. W. Kohn, and M. S. Kohn, was this day produced to me by the parties in said county and state and then and there acknowledged by said William Ploss and R. Webster, Pres. and Secretary, respectively, of Central Distr. Co., Inc., to be their act and deed.

Given under my hand and seal of office this 9th day of February, 1937.

Elsie M. Dewald, Notary Public. My commission expires 10/9/40. (Seal.)

[fol. 29] \$3000.00.

February 9, 1937.

On demand after date, for value received we promise to pay to the order of Carrie Kohn, J. W. Kohn and M. S. Kohn, Three Thousand 00/100 Dollars, with interest thereon at the rate of six per centum per annum, payable on demand interest being payable at #45 E. Eleventh St., Newport, Kentucky, and is secured by a chattel mortgage on fixtures and merchandise. On failure to pay said note or interest thereon, when due or upon demand thereof, thereupon said note shall immediately become due and payable without further notice or demand, such further notice and demand being hereby expressly waived.

And we hereby authorize any Attorney-at-Law to appear in any Court of Record in the State of Ohio, or in any other State in the United States, after the above obligation becomes due, and waive the issuing and serving of process and confess a judgment against us in favor of the holder hereof for the amount appearing due, and costs of suit; and thereupon to release all errors and waive all right of appeal.

Central Distributing Company, Inc., by William Ploss, Pres., by R. Webster, Sec'y.

"Exhibit A."

[fol. 30] STATE OF KENTUCKY,
Campbell County, set:

I, Geo. J. Kaufmann, Clerk of the County Court within and for the County and State aforesaid, the same being a Court of Record, having a Seal and having Jurisdiction of the Probate of Wills and the appointment and qualification of Executors, Administrators, Guardians and other Fiduciaries, do hereby certify that the foregoing and hereto attached writing contains a full and complete copy of the Chattel Mortgage from the Central Distributing Company, Inc., to Carrie Kohn, J. W. Kohn and M. S. Kohn, as the same appears of record in Chattel Mortgage Book No. 18 Page 491 File No. 977, Campbell County Kentucky Records at Newport, Kentucky, as fully as the same appears from the Records on file in my office.

In Testimony Whereof, I have hereunto subscribed my hand and affixed the Seal of said Court at my office in Newport, Kentucky, this 1st day of March A. D., 1938.

Geo. J. Kaufmann, Clerk, by William A. Otting, Jr.,
D. C.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF M. McDOWELL—Filed April 11, 1938

The affiant deposes on oath and says that he is acquainted with the market value before and since the imposition of the tax of \$3.12 per case imposed by the legislative act of 1936. That prior to the enactment of said act, the retail and wholesale business prosperous in Kentucky, but that since the passage of said act more than half of the wholesalers and retailers have gone out of business in the counties of Campbell and Kenton counties in Kentucky.

That a tax of \$1.04 on the medium and lower grades of whiskey as to age is confiscatory, this whiskey being marketable at from 45 cents per gallon to \$1 per gallon or as cases from \$13 per case with the tax to \$18 per case with the tax.

The consumption in all the retail stores where this affiant has inquired complain that the buyers will not pay the price including the tax and that prior to the imposition of the tax business was good and there was a good price in this

class of whiskies, which today has fallen into disgrace and is a loss to most wholesale and retail operators. Fifteen year old cased whiskey of the Bourbon type, made in Kentucky is worth about \$70 per case and four year bonded whiskey is worth about \$31 per case, while six months old whiskey is worth about from \$12 to \$13 per case including tax.

That your affiant believes that the tax has been ruinous to the medium and cheaper grades of whiskey, lessening and destroying in most cases all of the profit because the public will not buy at the price plus the tax, and this kind of whiskey composes seventy-five per cent of the bulk of whiskey sold at wholesale and retail.

M. McDowell.

Subscribed and sworn to before me this the 7th day of April, 1938. W. A. Schuberth, Notary Public Hamilton County, Ohio. My commission expires June 26, 1940.

[File endorsement omitted.]

[fols. 32-34] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. O. PIEPER—Filed April 11, 1938

Affiant, A. O. Pieper, deposes on oath and says that he is a Wholesaler in spirituous liquors in Covington, Kenton County, Kentucky, that he has been in said liquor business in said county and state since the year of 1934; that he is well informed with reference to the business aforesaid, the wholesale prices of whiskey and the tax assessed against same by the Department of Revenue of the State of Kentucky; that the price per case on one of the cheapest whiskies, namely, West Point, is \$9.00 per case of quarts, and the price on Old Grandad or Old Taylor is \$30.12 per case of quarts, and the price on 15 year old Sunnybrook is \$70.00 per case of quarts, that the tax assessed by the State of Kentucky on whiskey sold in the State is \$1.04 per gallon, or \$3.12 per case; that the same tax is assessed on whiskey named West Point, the lowest priced; Old Taylor, Old Grandad, the medium priced; and on the 15 year old Sunnybrook, the highest priced; that the requirements are

to affix on quart bottles of whiskey a twenty-six cent stamp, on pint bottles of whiskey a thirteen cent tax stamp, and on half-pint bottles of whiskey a seven cent tax stamp; that the tax on a case of quarts of whiskey is \$3.12; that the tax on a case of pints is \$3.12, and that the tax on a case of half-pints is \$3.36, regardless of the value of the whiskey or spirituous liquors; that after the enactment of the 1936 tax act, which levied the aforementioned tax on whiskies or spirituous liquors, the profit was greatly curtailed to the wholesaler as well as the retailer on the cheaper grades of whiskey sold, that the profit on the other grades of whiskey was also greatly reduced, thus causing many and divers wholesalers and dispensers who were operating prior to the enactment of the 1936 tax act, to suspend operations, and compelling them to discontinue their business upon which they spent large sums of money to build up, by reason of a great many consumers having formerly purchased their whiskies and spirituous liquors from retailers in the State of Kentucky, and by reason of said tax, having diverted their purchases to other neighboring states on account of it being impossible for a retailer in the state of Kentucky to compete with the prices of other states on account of the aforementioned tax.

A. O. Pieper.

Subscribed and sworn to before me this 5th day of April, 1938. Eleanor Webster, Notary Public, Kenton County, Kentucky. My commission expires 1/11/40.

[File endorsement omitted.]

[fols. 35-36] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HARVEY H. SMITH—Filed April 11, 1938

The affiant Harvey H. Smith deposes on oath and says that he is a member of the bar of the Supreme Court of the United States and of the Court of Appeals of Kentucky and counsel for the plaintiffs above named. That he received

the attached charges against the Central Distributing Company, Licensee, defendant and has examined the same.

That Exhibit A was received about the 1st day of March from the Central Distributing Company Inc. Licensee defendant, which charges a violation of the Act of 1934 repealed on March 3 thereafter, and for violation of the Act of 1936.

On April 6th, 1938 affiant received from Plaintiffs the exhibit B which shows that the charges of violating the Act of 1934 are attempted to be carried over under the Act of 1938, though said Act has been repealed.

The charges for said hearing are before Theo. Hageman, Director Division of Alcoholic Control.

The Second notice of a hearing, the same hearing, is to be had before the Kentucky Alcoholic Beverage Control Board in the new capital, an entirely different organization created by law since the first charges were made, and said officials are none of the officials who were to hear said proceedings in Frbry. as per notice.

This affidavit is offered in evidence for the purpose of showing and proving the allegations of Plaintiff's petition that said tax is attempted to be collected in denial of due process.

Harvey H. Smith.

Subscribed and sworn to before me this the 7th day of April, 1938. W. W. Schuberth, Notary Public, Hamilton County, Ohio. My commission expires, June 26, 1940.

[fol. 37]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY J. COOK—Filed April 11, 1938

Affiant, Henry J. Cook, deposes on oath and says that he is a practicing attorney in Newport, Campbell County, Kentucky; that he was and is one of the attorneys for the Central Distributing Company, Incorporated; and that on the — day of February, 1938, he received a copy of a peti-

tion which was filed in Franklin Circuit Court, styled, "Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, vs. Central Distributing Company, Incorporated", and that said petition contained the following allegation:

[fol. 38] "Wherefore, plaintiff prays judgment against the defendant, Central Distributing Co., Inc., a corporation, for the sum of \$3,191.89, plus the further sum of \$638.38 penalty as provided by Section 4281c-22, Carroll's Kentucky Statutes, Baldwin's 1936 Edition, and the further sum of \$638.38 penalty as provided by Chapter 21 of the Acts of the Fourth Extraordinary Session of the General Assembly of Kentucky of 1936-1937, plus interest on said taxes from the respective due dates thereof at the rate of 6% per annum until paid."

Henry J. Cook.

Subscribed and Sworn to, before me by Henry J. Cook, this 11th day of April, 1938. Agnes M. Hearn, Notary Public, Campbell County, Kentucky. My commission Expires July 4, 1941.

[fol. 39]

AFFIDAVIT EXHIBIT "A"

February 28, 1938.

Central Distributing Company, Newport, Kentucky.

GENTLEMEN:

Pursuant to powers invested in me by the Kentucky Alcoholic Control Act of 1934 and the Reorganization Act of 1936, you are hereby cited to appear before me in the New Capitoli, Frankfort on Friday, March 4, at 10 o'clock to show cause why your Wholesale Liquor License No. 56 should not be revoked.

Numerous complaints have been received against your continued operations as a Wholesale liquor dealer. The following charges will be presented against you at the hearing specified:

1. The Central Distributing Company has failed to pay the consumers' tax imposed by the Kentucky Alcoholic Beverage Tax Law of 1936, codified in Carroll's Kentucky

Statutes, 1936 Revision, as Sections 4281c-1-23. The claim for delinquent taxes based upon an audit completed by field representatives of the Department of Revenue is now pending in court. Evidence of this liability, as well as others, may be presented.

2. You are charged with selling spirits in Kentucky in containers to which the consumers' tax stamps have not been affixed, as required by Sections 4, 5, 6, 10, and 13 of the above mentioned law.

3. The Central Distributing Company is further charged with selling spirits in Kentucky to persons who are not licensed in Kentucky or by any other state authority. This practice is in violation of Article IV, Section 5 of the Alcoholic Control Act of 1934, codified in Carroll's Kentucky Statutes, 1936 Revision, as Section 2554b-15, Section 8 of the Alcoholic Beverage Tax Law of 1936, and Regulation Ch-3 adopted by this Department and the Department of Revenue on February 7, 1938. Evidence will show that non-licensed persons drive to your place of business, obtain liquor and transport the same to an unknown destination.

[fol. 40] 4. Various charges relating to the collection and administration of liquor taxes will also be presented. You have imported spirits without having a valid import permit, as required by Section 421a-17 of Carroll's Kentucky Statutes, 1936 Revision, according to compliants received. It is charged that you have failed to abide by the regulations of the Department of Revenue, among which is one requiring the return of green triplicates of import permits within 90 days from the date of issuance. It will also be shown that you have failed to comply with requests of the Department of Revenue relative to liquor tax reports and the supplying of information of the same or similar nature.

Charges against your continued operation as a Wholesale Liquor licensee will be made formally at the hearing mentioned above. You will appear prepared to make any defence you can.

Very truly yours, Theo. Hageman, Director Division of Alcoholic Control.

TH:TH.

CC.: Department of Revenue.

FCL. Copy

[fol. 41]

AFFIDAVIT EXHIBIT "B"

COMMONWEALTH OF KENTUCKY
Department of Revenue, Frankfort

April 5, 1938.

Central Distributing Company, Newport, Kentucky.

GENTLEMEN:

Pursuant to Sections 43, 44 and 119 of the Kentucky Alcoholic Beverage Control Law of 1938, you are hereby cited to appear before the Kentucky State Alcoholic Beverage Control Board in the New Capitol at Frankfort on Wednesday, April 13, at 10:00 o'clock to show cause why your Wholesale Liquor License No. 56 should not be revoked.

You will come prepared to answer complaints relative to violations of the Kentucky Alcoholic Control Law of 1934 and the Kentucky Alcoholic Beverage Tax Law of 1936. The following charges, as indicated in our letter of February 28, will be presented against you at the hearing specified:

1. The Central Distributing Company has failed to pay the consumers' tax imposed by the Kentucky Alcoholic Beverage Tax Law of 1936, codified in Carroll's Kentucky Statutes, 1936 Revision, as Sections 4281c-1-25. The claim for delinquent taxes based upon this audit completed by field representatives of the Department of Revenue is now pending in court. Evidence of this liability, as well as others, may be presented.

2. You are charged with selling spirits in Kentucky in containers to which the consumers' tax stamps have not been affixed, as required by Sections 4, 5, 6, 10, and 13 of the above mentioned law.

3. The Central Distributing Company is further charged with selling spirits in Kentucky to persons who are not licensed in Kentucky or by any other state authority. This practice is in violation of Article IV, Section 5 of the Alcoholic Control Act of 1934, codified in Carroll's Kentucky Statutes, 1936 Revision, as Section 2554b-15, Section 8 of the Alcoholic Beverage Tax Law of 1936, and Regulation

Ch-3 adopted by this Department and the Department of Business Regulation on February 7, 1938. Evidence will show that non-licensed persons drive to your place of business, obtain liquor and transport the same to an unknown destination.

[fols. 42-44] 4. Various charges relating to the collection and administration of liquor taxes will also be presented. You have imported spirits without having a valid import permit, as required by Section 4214a-17 of Carroll's Kentucky Statutes, 1936 Revision, according to complaints received. It is charged that you have failed to abide by the regulations of the Department of Revenue, among which is one requiring the return of green triplicates of import permits within 90 days from the date of issuance. It will also be shown that you have failed to comply with requests of the Department of Revenue relative to liquor tax reports and the supplying of information of the same or similar nature.

Evidence to support each charge will be presented at the hearing. You will come prepared to make any defence you may.

Very truly yours, H. Clyde Reeves, Executive Assistant.

JBW:TH.

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR JUDGMENT ON AMENDED PETITION—Filed April 11, 1938

Come now the petitioners, and move the court for judgment on the amended petition of petitioners, and in this behalf submit evidence.

Smith and Schuberth, Henry J. Cook, Attorneys for Petitioners.

[fols. 45a-45b] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed April 16, 1938

Comes the defendants, Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, and Louis C. Sickmeier, Sheriff of Campbell County, Kentucky, and move the Court to dismiss plaintiffs' petition as amended; and as reasons for said motion state that plaintiffs herein have a plain, adequate and complete legal remedy and that this Court is without jurisdiction to grant the relief prayed for in plaintiffs' petition as amended.

Wherefore, these defendants pray that the petition as amended herein be dismissed.

Hubert Meredith, Attorney General, Commonwealth of Kentucky, by William Hayes, Assistant Attorney General. Clifford E. Smith, J. J. Leary, General Counsel, Department of Revenue.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 46] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

J. W. KOHN, M. S. KOHN, and J. W. KOHN, Administrator of the Estate of Carrie Kohn, Petitioners,

v.

CENTRAL DISTRIBUTING COMPANY, INC., 45 E. 11th Street, Newport, Kentucky, and the Commonwealth of Kentucky, by and on the Relation of James W. Martin, Commissioner of Revenue, and L. C. Sickmier, Sheriff of Campbell County, Kentucky

JUDGMENT AND ORDER ALLOWING APPEAL

This cause coming on for hearing before the Honorable Elwood Hamilton, United States Circuit Judge, John D. Martin, United States District Judge, and Mac Swinford,

United States District Judge, on the motion of the petitioners for a temporary and permanent injunction, and the petitioners being present by counsel H. H. Smith and Henry Cook, and respondents being present by counsel J. J. Leary and William Hayes, Assistant Attorney General for the Commonwealth of Kentucky; and the Court being fully advised, it is ordered, adjudged and decreed that the temporary and permanent injunction of petitioners be denied, and the motion of petitioners for said injunction be and is hereby overruled; and the petitions of the petitioners are dismissed, to all of which petitioners object and except.

It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act", furnishes petitioners an adequate remedy in Section Twelve (12) [fol. 47] of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act.

Petitioners, by their counsel, announced that they wished to appeal to the Supreme Court of the United States from the judgment, order and decree of this Court, and give notice in open court to that effect; which appeal is now granted and allowed by the Court.

Enter this 16th day of April, 1938.

Elwood Hamilton, United States Circuit Judge.

John D. Martin, United States District Judge.

Mac Swinford, United States District Judge.

[fol. 48] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

Come now the appellants herein, the petitioners in the court below, and considering themselves aggrieved by the decision of the three-judge United States District Court hearing in the above entitled cause, hereby pray that an appeal may be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon. Appellants attach hereto, as a part of this petition, their Assignment of Errors.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Come now the appellants and in connection with their appeal to the Supreme Court of the United States, from the hearing of the Honorable three Judges in the Eastern District on April 16th, 1938, and say that in the record and the proceedings and in the final judgment and decree and order thereof, manifest error has intervened to the prejudice of appellants, and for said errors assign:

Assignment of Errors

[fol. 50] I. The Court erred in not issuing the Injunction, both temporary and permanent.

II. The Court erred in holding that the Petitioners had an adequate remedy at law under Section 12 of the Act of 1934, entitled, "Kentucky Alcohol Control Act", enacted March 17, 1934, by the General Assembly of Kentucky.

III. That the Court erred in not holding that the Kentucky Alcohol Control Act as applicable to Petitioners' allegations in its said petition and amended petition was an unconstitutional and invalid Act, violative of Amendment 7 of the Constitution of the State of Kentucky, at the time of its enactment.

IV. That the Court erred in not holding that the section 4 of the Act of 1936, levying a tax of \$1.04 was an invalid Act of tax levy against petitioners' licensee's business, in medium and younger whiskies, violative of Sections 171, 172, 174 and 181 of the Constitution of Kentucky, discriminative, confiscatory, lacking in uniformity, a double tax on property prohibited by the 14th Amendment to the Constitution of the United States, denying equal protection of the laws and due process of the laws.

V. The Court erred in its judgment and decree to which Petitioners objected and excepted.

VI. The Court erred in not holding that the Franklin Circuit Court had no jurisdiction of the subject matter of the action, as shown in Petitioners' Amended Petition, or the parties.

[fol. 51] VII. The Court erred in not issuing an injunction against the said James W. Martin, Revenue Commissioner of the State of Kentucky, from holding a hearing to revoke Central Distributing Company's license, based on charges accruing, if at all, under the Act of 1934.

VIII. The Court erred in not holding that the United States District Court for the Eastern District of Kentucky had jurisdiction of this cause of action to determine mortgagee's lien rights, on the ground of the diversity of citizenship, and in dismissing Petitioners' petition and the cause of action.

IX. The Court erred in not holding that the \$8000.00 import tax collected from the Central Distributing Company, Incorporated, was illegal and should be paid to the Central Distributing Company, Inc., violation, being of Section 8, Article I, of the Constitution of the United States, a burden on Interstate Commerce.

X. The Court erred in not sustaining each and every ground of the allegations set out in Petitioners' Amended petition as a denial of due process, the equal protection of the laws and a violation of Sec. 8, Article I, of the Constitution of the United States.

XI. That the petitioners have no adequate remedy at law for wrongs committed against them and its licensee, and unless these wrongs are redressed by the process of the Federal Court, Petitioners will suffer irreparable damage and injury in the said business on which, they hold mortgage lien, superior to the state of Kentucky's claim.

Harvey H. Smith, Henry J. Cook, Attorneys for
Appellants.

April 16, 1938.

[fols. 52-61] For which errors herein assigned, your petitioners pray that the said judgment, decree and order of the United States District Court for the Eastern District of Kentucky, three judges sitting, dated April 16, 1938, in the above entitled cause, be reversed, and a judgment rendered in favor of the said petitioners, and for their costs.

Smith and Schuberth, Henry J. Cook, Attorneys for
Appellants.

Received copies of the within petition in error and assignment of errors and accepted notice of the filing thereof this April 18, 1938.

Hubert Meredith, Attorney General Com. Ky., by William Hayes, Asst. Attorney General; J. J. Leary, Counsel Revenue Department, Commonwealth of Kentucky.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is stipulated and agreed by and between the parties to this action and their counsel respectively that the following papers, part of the record in this cause shall be and constitute the record on appeal to the Supreme Court of the United States, as follows:

Exhibits a, b, c, d, e, f, g, h.

Amended petition.

Order February 26, 1938.

Notice of service on attorney general.

Chattel mortgage and note.

Affidavits of McDowell, Peiper, Smith, Macke, H. H. Smith, Bayer, Cook and Exhibit- A and B charges of the state for violations of state law.

Order filing affidavits.

Motion for temporary restraining order and Motion for permanent Injunction.

Order denying of three judges and allowing appeal.

Petition on Appeal and attached assignment of errors.

Order filing petition on Appeal.

Bond on Appeal.

Acceptance of Notice.

Order to file jurisdictional grounds.

Motion to file jurisdictional grounds.

Petition stating grounds and supporting statute and authorities.

This stipulation.

You have all off these papers except possible statement of jurisdictional grounds, which I can send you.

William Hayes, Asst. Attorney General. J. J. Leary, Attorney for Department of Revenue. H. H. Smith, Henry Cook, Attorneys for Appellants.

[fols. 63-65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF RECORD TO BE PRINTED—Filed October 26, 1938

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The appellants and each of them respectfully designate the essential portions of the record to be printed as pertinent and necessary to the determination of the vital questions of the record as presented, and on the issues as made:

1. The Amended Petition of the Plaintiffs:
2. The affidavits in support of the petition as amended.
3. These are:
 - a. Louis P. Holthamer: b. Miller McDowell: c. A. O. Peiper: d. Harvey H. Smith: e. Henry J. Cook.
 4. Order of the Court permitting the filing of the amended petition, by Judge Swinford.
 5. Mortgage of the Central Distributing Company Inc. to J. W. Kohn et al.
 6. Motion for judgment April 11th, 1938, on the pleadings and the record.
 7. Order of Judge Swinford April 12, 1938, for a hearing [fol. 66a] before Three judges of the United States District Court.
 8. Order and judgment denying injunction April 16th, 1938.

9. Defendants motion to dismiss Amended Petition, April 16, '38.
10. Notice of Appeal.
11. Statement of grounds of jurisdiction.
12. Praeclipe for Record.
13. Order allowing appeal and assignment of errors and bond.
14. The Assignment of Errors.
15. Stipulation as to record and waving citation.
16. Citation June 9th, 1938.
17. Section 172 of the Constitution of Kentucky.
18. Section 171—first twelve lines of Exhibit C thereof as shown in statement of jurisdiction. (Constitution of Kentucky)
19. Exhibit B. being section 976 of the Kentucky Statutes, Carrolls Revised. Set out in Statement of Jurisdiction, page 7.
20. Exhibit A being section 63 as set out in statement of jurisdiction, page 7. Carrolls Code of Kentucky.
21. Designated in the order of the court as section 12, in fact section 2 of the Act of 1934 reading as follows, inclusive of sec. 2554-64 Chap. 146, Art. 6—sec. I, March 17, '34:

“No suit shall be sustained in any court to restrain or delay the collection or payment of any fee or tax levied by this Act.

The aggrieved taxpayer or permittee shall pay the tax or fee as and when required and may at any time within two years from the date of such payment sue the commonwealth through its agent, the Auditor of Public Accounts, in an action at law in any court, State or Federal, otherwise having jurisdiction of the parties and subject matter for the recovery of the tax or fee paid with legal interest thereon from the date of payment. If it is finally determined that said tax or fee or any part thereof was wrongfully collected, for any reason, it shall be the duty of the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax or fee so adjudged to have been wrongfully collected, together with legal interest thereon. The Treasurer shall pay the same at once out of the general expenditure fund of the state in preference to other warrants or claims against the Commonwealth. A separate suit need not be filed by each separate individual payment made by any taxpayer, but a recovery

may be had in one suit for as many payments as may have been made."

22. Section — of the statutes of Kentucky (Carrolls) providing a tax under section 172 of the Constitution of Kentucky, as follows:

"There is hereby levied upon the sale or distribution by sale or gift a tax of one dollar and four cents (\$1.04) on each wine gallon of spirits, and a like or proportional rate per gallon on spirits sold or distributed in any other container of more or less than one gallon."

[fol. 66b] 23. Section 4214 a-17 of the Kentucky (Carroll's) Statutes, provide for a tax on imports, which is as follows:

"Every person who purchases distilled spirits, and has same shipped into the state of Kentucky from points without the state as provided in section 5 hereof shall at the same time said permit is issued pay a license tax thereon of 5¢ per gallon."

24. Section 172 of the Constitution of Kentucky provides that,

"All property shall be assessed at its fair cash value at what it would bring at a voluntary sale."

25. Section 174 of the Constitution of Kentucky provides that,

"All property, whether owned by natural persons or corporations shall be taxed in proportion to value, unless exempted by this Constitution, and all corporations shall pay the same rate of taxation paid by individual property."

Respectfully submitted for printing of the record,
Harvey H. Smith, Smith and Schuberth, William A.
Schuberth, Attys. for J. W. Kohn et al.

Service of copy of the above and foregoing designation to print is hereby acknowledged.

— — —, Attorneys for Appellees.

[fol. 66c] [File endorsement omitted.]

[fol. 67] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON IN APPEAL—Filed
November 12, 1938

The Appellant relies on the following points on appeal designated in their Petition in Error, and shown on the record as printed.

1. Section 380 of the Judicial Code provides for injunctive relief against a proceeding by state officer imposed on an individual or a corporation under the authority of an unconstitutional statute where the damage is immediate and irreparable.

We rely on the United States Supreme Court authorities and the record showing special levy for taxes and penalties on property mortgaged to Appellants, when such taxes, alleged, were declared by J. W. Martin, Internal Revenue officer, and acting under authority of the state of Kentucky, and a statute contrary to the Constitution of Kentucky—sections 109-125-126 where the exercise of judicial power is limited to the courts, and penalties declared without judicial hearing, a denial of due process and equal protection of the laws of Kentucky. Violates 14th Amendment.

2. Section 72 of the Code of Civil Practice of Kentucky provides for the jurisdiction of the Circuit Courts of Kentucky to be at the place of business of the corporation or its Service Agent, and that the issuing Court, Franklin Circuit Court has jurisdiction only of civil actions, section 63 of Carroll's Code of Practice, and section 976 of Carroll's Kentucky Statute, and Section II of its Criminal Code, which confines its jurisdiction to Civil causes under civil statutes—its proceeding here being under a criminal statute. Section 22 of the original Act 1934 and 1936 provides for a fine of \$50 and as much as \$1000; a jail sentence of one month, and as much as one year. To seize property by order of a court acting in excess of its jurisdiction, violates section 109 of the Constitution of Kentucky and section 126 of the [fol. 68] Constitution of Kentucky: And the 14th Amendment relying on sub section 29 and 59 of the Constitution of Ky., which prohibits special legislation and delegation of power, secs. 60 and 3. also relied on. 4214-d-14 (Kentucky Statute).

3. That Appellant relies on the fact, section 2 of the Act of 1934 March 7th, does not provide an adequate remedy for

the recovery of unconstitutional taxes, in that, suit must be brought, and the tax paid in advance of sales on domestic liquors, not imported, and taxes also must be paid in advance of importation of liquors from without the state at the rate of five cents per gallon, and permits may be refused for such importations by a state official, thereby burdening interstate commerce of such individuals engaged in wholesale importations: and said provisions attempts to and does limit the bringing of said suit to recover import taxes within two years, and if suit is brought to recover taxes, and the wholesaler is still in business, his license permit will be promptly revoked. This Act of 1934 is to be relied on as repealed and not properly carried into another Act under the Constitution of Kentucky, sections 51 sub. 29 of 59—60 and if not repealed, then it gives the Court the discretion to issue Mandamus to the Auditor should he refuse for any reason to pay the tax. We rely on this point as a denial of an adequate remedy at law for recovery of unconstitutional taxes, it providing for no allowance of attorney's fees. These allegations were undenied. Sec. 4214-a-16, Act of Sept. 26, '33—4214-a-23 and sec. 4214-d-12 (Ky. St.)

4. The seizure by the Sheriff on an order of the Circuit Court of Franklin County, Kentucky, of Appellants property and business, and closing it, gave the Appellants, who held a mortgage on the assets no chance to enforce their mortgage and collect their note, and impaired their contract with Central Distributing Company, Inc., contrary to section 19 of the Constitution of Kentucky and the Constitution of the United States. Amendment 14 (U. S. Con.).

5. Appellants motion for judgment should have been sustained. Relied on.

6. There is diversity of citizenship, giving the Court jurisdiction to foreclose mortgage for Appellants, para [fol. 69] graphs one and two of Appellants Amended Petition, and Mandatory injunction, to release said assets and business, was the only adequate remedy.

7. Arbitrary seizure of mortgaged property, paragraph 4 of the Appellant's Amended Petition, on which Appellant's Mortgagor had paid import taxes, and which was moving in Commerce, and these taxes attempted to be collected constituted a violation of Art. I Section 8 of the Con-

stitution of the United States by imposing a domestic tax burden on it, the state of Kentucky then having in its possession, in excess of \$9000 of money, the property of the Central Distributing Company, Inc., which it had refused to return to Appellant's Mortgagor, and which, when Appellants made their motion for judgment was undenied, and Appellants therefore were entitled to an injunction on its confessed allegations, at the time of making said motion for judgment, after failure of Appellees to deny the allegations therein.

8. Import taxes laid on commerce between the states are void; this allegation of Amended petition that mortgagees relied for payment upon the collection of the import taxes then due Mortgagor. We rely on this issue as admitted and undenied on the hearing on the merits of the action. Sec. 4214-16 and 4214-a-17 (Kentucky Stat.)

9. The enforcement of the legislative Act of 1938, March 7th, to enforce the terms of the Act of March 17th, 1934, repealed after this action was filed, was contrary to the Constitution of Kentucky-Expost Facto, sec. 19.

10. There was no adequate remedy to prevent cancellation of Mortgagor's license for non payment of taxes, not constitutional, without first determining in a court of record whether such taxes were validly assessed, and whether said penalties were validly assessed by a competent Court. Neither 1934 and 1938 Act provided for Judicial hearing. Constitution of Kentucky—secs. 26, 27, 28, 109.

11. Sections 26, 27, 28 and 109 of the Constitution of Kentucky reflect the limitations of delegated judicial power. We rely on these sections as prohibiting arbitrary enforcement [fol. 70] penalties and or taxes, being not found by a judicial body, and the Revenue Commissioner is not qualified under the Constitution to assume such judicial power; and in this respect Appellants were deprived of their property without due process—14th Amendment to the Constitution of the United States; injunctive process, was Appellants only remedy that was adequate. "Injunction to prevent collection of an illegal tax is the only adequate remedy"; Brady vs. Bannon 134 Kentucky, Page 769. We rely on this issue made and confessed by failure to deny Amended petition. 18 sub. 4 of 59, Kentucky Constitution.

12. A repealed Act, the 1934 Act, licensed Central Distributing Company, and its privileges were under that Act, and its offenses by which any legal authority of the state might impose penalties repealed with it, and with its repeal, prosecutions then pending, died.

13. The taxes levied on Imports, which left the Mortgagor allegedly in debt to the state of Kentucky, \$3150, for state taxes under that portion of the Act of 1936, authorizing one dollar and four cents per gallon, or approximately taxes on nine hundred and fifty cases of liquors, violated section 8 of Art. I, of the Constitution of the United States. Disregard of payment of import taxes by state officials denied due process.

14. The taxes levied of Thirty One Hundred and Fifty dollars at \$1.04 per gallon were illegal, and violated sections 171, 172, 174, and 181 of the Constitution of Kentucky, in that said taxes were not levied on the fair cash value of the whiskey, lacked uniformity; were discriminatory as to newer grades, and confiscatory, in that whiskey of the value of forty five cents paid the same tax as pre war whiskey, valued at Eighteen dollars per gallon, and was an *ad valorem* tax and not an excise tax under the Constitution of Kentucky. A manufacturers tax of five cents per gallon was levied at the same time, which is an *ad valorem* tax. Two *ad valorem* taxes cannot be levied under the Constitution of Kentucky. Sec. 181, (192 Ky. Rep. 36 294 U. S. 550, 7 Fed. Supp., 438) (Kentucky Stat. sec. 4022-4020).

[fol. 71] 15. The foregoing points are relied on as a denial of guaranteed rights to the individual citizen against the imposition by the *the* Legislature of Kentucky and official representatives of the state of Kentucky, by which unlawful and oppressive Acts these Appellants were and are deprived of their property and all of which are repugnant to the provisions of the Constitution of the United States.

Respectfully Submitted, Member Supreme Court:
Harvey H. Smith, William A. Scuberth, Henry J.
Cook, Attorneys for Appellants; Harvey H. Smith.

Copy of the foregoing Points served on me this day—Nov.
— 1938 and service by copy acknowledged.
_____, Attorneys for Appellees.

STATE OF KENTUCKY,
Franklin County:

The affiant, Frank M. Dailey, Jr., states that he is an attorney-at-law and that he delivered on this day a carbon copy of the within and foregoing Points and Authorities relied on in the appeal in the within styled cause pending in the Supreme Court of the United States to J. J. Leary, an Attorney in the office of Clifford E. Smith and an associate of said Smith.

Frank M. Dailey, Jr.

Subscribed and sworn to before me by Frank M. Dailey, Jr., this 10 day of November 1938. Lucille Eddins, Examiner Franklin Co., Ky.

[fol. 72] [File endorsement omitted.]

Endorsed on cover: File No. 42,662. E. Kentucky, D. C. U. S. Term No. 177. J. S. Kohn, M. S. Kohn and J. W. Kohn, Administrator of the Estate of Carrie Kohn, Deceased, appellants, vs. Central Distributing Co., Inc., and the Commonwealth of Kentucky, etc. et al. Filed July 5, 1938. Term No. 177, O. T., 1938.

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